DOCUMENT RESUME

ED 120 078 SO 008 992

AUTHOR Riscalla, Louise Mead
TITLE Legislative Backlash: The Dilemma and Alternatives.
PUB DATE 75
NOTE 9p.; Paper presented at the Annual Meeting of the American Psychology-Law Society (Chicago, Illinois, September 1975)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage
DESCRIPTORS Civil Liberties; Civil Rights Legislation; *Due Process; Institutionalized Persons; *Legal Responsibility; *Legislation; Medical Services; Public Health Legislation; Public Service Occupations; *Student Rights

ABSTRACT

Distinctions must be made between the positive intent of certain legislation and the negative backlash which this legislation can create for those persons it is intended to help and protect. Recent laws have been passed, for example, requiring physicians to obtain a patient's consent before treatment can begin and to provide sufficient information to the patient so that he can make an intelligent decision. Problems arise, however, when the patient does not have the capacity to consent or if the patient is institutionalized and, therefore, conditioned to obey officers in charge, or is of "lower"socioeconomic status and lacks knowledge of legal recourse. The field of children's legislation, also, provides a wealth of examples to support the thesis that the intent and reality of certain legislation are not congruent. Children are now entitled to due process in the school system and can abuse enlightened parents, teachers, and other professionals concerned with their education if youth stress their individual rights at the expense of the rights of others. Fundamentally, these findings suggest that since laws are made and implemented by human beings and since much of the difficulty and confusion resulting in legislative backlash is due to a perspective involving operationalism, those persons working in public service professions must be committed to live by a higher standard than that of the law. (Author/DDB)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED120078

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

LEGISLATIVE BACKLASH: THE DILEMMA AND ALTERNATIVES

by

Louise Mead Riscalla

SØ 008 992

LEGISLATIVE BACKLASH: THE DILEMMA AND ALTERNATIVES*

Louise Mead Riscalla
New Jersey State Diagnostic Center
Menlo Park, Edison, N. J. 08817*

Legislation has been used as a means of helping the professional to be of service and to provide the individuals who receive services with some control over information and decisions which play a vital role in the course of their lives. However, such legislation often has adverse consequences which negate the beneficial effects or compound problems for the individual, thus presenting a dilemma. Examples of legislation will be presented to demonstrate the positive intent and negative backlash. It is posited that the dilemma, in the final analysis, is due to interpretation of the legislation based on the perspective of the individual.

Informed consent is designed to protect a patient from treatment which could have harmful consequences on his body, mental status, or be life threatening. The law requires that the physician obtain the patient's consent before treatment begins (Katz, 1972). Consent must be freely given and the patient have sufficient information provided by the physician to make an intelligent decision (Katz, 1972). This information must include an explanation of proposed course of treatment, risks and side effects, estimate of the chance of success and consequences of failure, and alternate procedures (Katz, 1972). If a patient does not have the capacity to consent, the procedure must be authorized by someone with legal authority to provide the required consent (Foster, 1975).

---

*Part of a symposium: Public Policy Issues, presented at the annual convention, American Psychology-Law Society, Chicago, September 1, 1975. John Edwards, Chairperson.

*Now at Woodbridge Emergency Reception and Child Diagnostic Center, P.O. Box 203, Avenel, N. J. 07001

Under circumstances when emergency procedures are necessary, the law may imply consent of the patient to those emergency measures (Foster, 1975). While it appears that the doctrine of informed consent protects a large number of patients, it is particularly inadequate to protect institutionalized persons and those of "lower" socio-economic status. For example, prisoners are conditioned to obey the officers in charge constantly and institutions have such a vast number of informal privileges and sanctions that individuals submit with apparent consent. Burton (1974) indicated reasons as to why voluntary consent is not possible with institutionalized individuals. For example, many mental patients and prisoners tend to consent to treatment based on a perception that the institution would still proceed with the treatment (Burton, 1974). If voluntary consent could be obtained, enforcement is difficult because it often happens that the immate frequently of low socio-economic status without friends or family, is not aware of the legal recourse available and lacks the knowledge or funds to initiate a law suit when his rights are violated. The amount and kind of information provided to a patient presents a problem. Although it is possible that disclosure of medical information could be harmful to the individual, Harrower and Hermann (1953) found that 90 per cent of patients with multiple sclerosis believed that they should be informed so that they could be able to plan their lives, avoid spending money needlessly, etc., and of 34 patients who were not told of their diagnosis, 91 per cent were discouraged. Constanza, a physician, indicated that individuals should insist on knowing their own diagnoses and what could be expected of any disease with which one is afflicted, including those which are fatal (Constanza, 1973). In the final analysis, the amount and kind of

information provided to the patient is considered by the law as "an 'it all depends' rule which is not fixed and certain (Foster, 1975, p. 49)." The difficulties occur from a perspective including a concrete, literal interpretation. In order to obviate misunderstandings and the creation of a dilemma, it is important to interpret the law by an understanding of the patient as an individual in the context of his daily lived-in world.

Children's rights legislation which seeks to protect the rights of children can have harmful consequences, especially if the legislation is carried to extreme forms. Children are now entitled to due process in the school system. The complexity and length of the procedure of due process present difficulties in application to a school setting and if "applied rigorously in school, the educational organization would probably come to a halt (Duffee, 1974, p. 57)." With suspensions, the Supreme Court provided only "minimum" due process, because the student before suspension is not constitutionally entitled to have a lawyer, cannot call on his own witnesses to testify, or cross examine witnesses (Duffee, 1974; Nolte, 1975). Due process poses a dilemma in that suspensions are frequently given to discipline troublesome students in order to protect the rights of other students and school property, yet at the same time to protect the rights of each individual child. There is a problem in balancing the rights of the states to have meaningful, peaceful schools and concurrently, to protect the constitutional rights of children. The rights of children are often at the expense of the rights of parents, teachers, and institutions which generate a considerable amount of resistence and ways of finding legislative loopholes. Children with little or no respect for others are often protected by the law

and manipulate over zealous child advocates which could perpetuate delinquency. It often happens that enlightened parents, teachers, and other professionals concerned with children are abused in the process.

The Buckley Amendment gives students 18 years and older and their parents access to their school records and an opportunity to challenge material in those records which are considered misleading or inaccurate (PIRG Action, 1975). The Buckley Amendment also provides that institutions or other agencies must obtain written consent of parents before releasing data about children (PIRG Action, 1975). The Buckley Amendment has been criticized for its lack of clarity in areas such as, what constitutes an official file, when should hearings be held in that it could conceivably mean that a hearing must be held whenever a student or parent disagrees with a test score or grade (Trotter, 1974). The lack of material in a file on a child's background often necessitates a duplication of services such as psychological testing and medical studies, which frequently delays needed services. Children have often complained that nothing has been done for them and as a consequence, manifest a lack of trust in professionals and often resort to acting out behavior not caring what happens to them. The concept of privacy can prevent courts from gaining access to information which is used in the rendering of decisions. However, courts are frequently forced to make decisions based on superficial presentence reports or scanty information provided by concerned social agencies or individuals. Polier (1975) indicated that the courts are more concerned with conformity to the requirements of due process than with what happens to a convicted defendant. If the juvenile justice system is to have a rehabilitative philosophy and serve as a constructive, therapeutic force in society, it is necessary that

information in the files be evaluated by the courts and other professionals in order to help render a decision that can be beneficial to the defendant. According to Polier, some reformers in the area of juvenile justice and judges have accepted positions that alienate them "from professional responsibilities for the delivery of services, and become party to the abuse of children (Polier, 1975, p. 359)."

Much of the difficulty and confusion resulting in legislative backlash is due to a perspective involving operationalism. In the present context, operationalism assumes that legal concepts secure their meaning from a relevant set of operations involved. The law is then interpreted literally and is viewed as having certain prescribed actions (operations) in order to fulfill the requirements of the law. As a consequence, there is a tendency to become so involved with what is perceived as conformity with the law, that what happens to an individual or circumstances in society are overlooked. Burton (1974) indicated that "...legal intervention of any kind is likely to achieve its purpose imperfectly, for legal rules and procedures are always susceptible to interpretation, evasion, and the inequalities of the social context in which they function (p. 696)." In formulating a course of action, it is important to understand what is actually taking place and then respond accordingly within the framework of the law. This perspective is consistent with some current views held in the legal profession. For example, according to Foster, "...most often the law, in one way or another, makes a commitment to expediency and pragmatism, and within the doctrinal limits of relevancy, it is a practitioner of "situational ethics" (p. 40)." The law has a perspective involving a contextual approach in which the individual is perceived in the context of his own unique individuality and

environmental surroundings as part of the society in which he lives. "By a weighing and balancing process the law adjusts and seeks to maintain an equilibrium or homeostasis so that all interests survive and achieve priority according to contemporary values as perceived by the judicial process (Foster, 1975, p. 40)." The law is flexible and in the final analysis, there can be no concrete answers to concrete problems.

Laws are made and implemented by human beings. The professional ideal is a committment to service and assistance to our fellow human beings, and therefore, particularly those working in helping professions are also committed to live by a higher standard than that of the law. "People who are awake to realities, aware of their inner selves, and accurately informed of their environment can best contribute to the social, moral, and political reforms vital for an enlightened society (Riscalla, 1972, p. 131)." An enlightened perspective would be a positive, influencing factor toward negating the legislative backlash.

References

Burton, S. The new biotechnology and the role of legal intervention. American Journal of Orthopsychiatry, 1974, 44, 688-695.

Constanza, M. The medical mystique: Does anyone speak for the patient? Paper presented at the Pacific Medical Center Symposium on the Medical Mystique, San Francisco, March, 1973.

Duffee, D. Due process: Can it thrive in a classroom? Instructor, 1974, 84, 55-58.

Foster, H. Jr. The conflict and reconciliation of the ethical interests of therapist and patient. Journal of Psychiatry and Law, 1975 (Spring) 39-61.

Harrower, H. and Hermann, R. Psychological factors in the care of patients with multiple sclerosis for use of physicians. New York: National Multiple Sclerosis Society, 1953.

Katz, J. Experimentation with Human Beings. New York: Russell Sage Foundation, 1972.

Nolte, M. The supreme court's new rules for due process and how (somehow) schools must make them work. American School Board Journal, 1975, 162, 47-49.

PIRG Action. Your right to know... 1975, 3, 1 and 4.

Pollier, J. Professional abuse of children: Responsibility for the delivery of services. American Journal of Orthopsychiatry, 1975, 45, 457-362.

Riscalla, L. The violence of nonviolence-A barrier to enlightenment. In R. Parker (Ed.) Emotional stress of war, violence, and peace. Pittsburgh: Stanwix House, 1972.

Trotter, S. Buckley amendment sparks controversy, gives students access to school files. APA Monitor, 1974, 5, 1 and 8.